MAINTENANCE OF INTERSPOUSAL TORT SUITS CONTROLLED BY THE LAW OF THE DOMICILE

Thompson v. Thompson
105 N.H. 86, 193 A.2d 439 (1963)

Plaintiff, a passenger in an automobile being driven by defendant husband, suffered injuries in an accident allegedly resulting from his gross negligence. The parties were domiciled in New Hampshire, but the accident occurred in Massachusetts. The New Hampshire married women's statute[1] had been found "to wholly remove the disability of coverture in respect of wrongs, and place married women upon an entire equality with their husbands . . ."[2] thus permitting interspousal tort actions. On the other hand, the Massachusetts statute[3] has been interpreted as disallowing tort actions between husband and wife.[4] The trial court found that the right of the wife to maintain an action in tort against her husband is determined by the law of the state where the accident occurred. Since New Hampshire had previously recognized the Massachusetts rule,[5] the trial court dismissed the action. The Supreme Court of New Hampshire reversed and remanded, expressly overruling one case[6] and effectively overruling others[7] on the grounds that the right is determined by the law of the domicile.[8]

The principal case is in the mainstream of two separate trends in the law. The first is that which permits maintenance of tort actions between spouses; the second, in the tort conflicts area, is the trend away from the *lex loci delictus* to the *lex loci domicilii* in resolving issues arising from a familial relationship between the parties.

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[1] N.H. Rev. Stat. Ann. § 460:2 (1955):

> Every married woman shall have the same rights and remedies, and shall be subject to the same liabilities in relation to property held by her in her own right, as if she were unmarried, and may convey, make contracts, and sue and be sued, in all matters in law and equity, and upon any contract by her made, or for any wrong by her done, as if she were unmarried.

[2] Seaver v. Adams, 66 N.H. 142, 144, 19 Atl. 776, 777 (1890).

[3] Mass. Gen. Laws Ann. ch. 209, § 6 (1955): "A married woman may sue and be sued in the same manner as if she were sole; but this section shall not authorize suits between husband and wife."

[4] Callows v. Thompson, 322 Mass. 550, 78 N.E.2d 637 (1948).

[5] Boisvert v. Boisvert, 94 N.H. 357, 358, 53 A.2d 515, 516 (1947). The court states: "The law of Massachusetts is well settled . . . that a wife cannot maintain an action of tort against her husband."

[6] Gray v. Gray, 87 N.H. 82, 174 Atl. 508 (1934).

[7] Morin v. Letourneau, 102 N.H. 309, 156 A.2d 131 (1959); Levlock v. Spanos, 101 N.H. 22, 131 A.2d 319 (1957); Boisvert v. Boisvert, *supra* note 5; Robinson v. Dixon, 91 N.H. 29, 13 A.2d 163 (1940); Miltimore v. Milford Motor Co., 89 N.H. 272, 197 Atl. 330 (1938).

[8] Thompson v. Thompson, 105 N.H. 86, 193 A.2d 439 (1963).

Historically, the wife could not maintain a suit in her own right, much less sue her husband in tort since, "by marriage, the husband and wife are one person in law. . . . [T]he very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of [the] husband: under whose wing, protection, and *cover,* she performs every thing. . . . "[9] This theory began to lose its adherents in the middle of the nineteenth century when the married woman's acts emerged.[10] Though these early statutes revolutionized the field of family law, the courts first interpreted the statutes as limited in their application to property rights.[11] In the field of personal torts, less than half of the courts continue thus to construe the statutes narrowly.[12] The majority of jurisdictions permit interspousal tort suits by means of a broad interpretation of the married woman's statute or by legislative enactment.[13]

Two of the policies underlying the prohibition of interspousal suits are the preservation of domestic tranquility and the avoidance of trivial suits. One writer, however, points out that there is usually little domestic tranquility left at the point where a spouse wishes to sue. As to trivial suits, he feels that suits arising from unimportant acts, technically torts, could be avoided by recognizing an implied consent or license arising from the marriage relation. When more serious injuries occur, he continues, a grave injustice is often worked by denial of a legal remedy.[14] Recognizing that insurance is usually involved in such suits, another writer states, "The real dangers are too much—not too little—family harmony. . . . "[15] An additional consideration for permitting such suits is based upon the emergence of liability insurance and its wide-spread use in our society. Dean Prosser points out that:

> Where there is [liability] insurance, it becomes still more difficult to maintain most of the stock arguments against recovery. Since the defendant will not have to pay out of his own pocket, it is obvious that the family exchequer will not be diminished, and that domestic harmony will not be disrupted so much by allowing

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[9] 1 Blackstone, Commentaries 442 (1771).

[10] Collected in 3 Vernier, American Family Laws §§ 167, 179, 180 (1935).

[11] 3 Vernier, *op. cit. supra* note 10, § 167.

[12] Prosser, Torts 882 (3d ed. 1964). See Kennedy v. Kennedy, 76 Nev. 302, 352 P.2d 833 (1960); Rodgers v. Galindo, 68 N.M. 215, 360 P.2d 400 (1961); Rubalcava v. Gisseman, 14 Utah 2d 344, 384 P.2d 389 (1963); Campbell v. Campbell, 145 W.Va. 245, 114 S.E.2d 406 (1960); Farage, "Recovery for Torts Between Spouses," 10 Ind. L.J. 290 (1935); Notes, 30 Chi.-Kent L. Rev. 343 (1952); Note, 42 Ky. L.J. 497 (1954); Note, 7 Vand. L. Rev. 717 (1954).

[13] See cases listed in 42 Ky. L.J., *supra* note 12, at 498 n. 4. See also N.Y. Gen. Obl. Law § 3-313, which states: "A married woman has a right of action for an injury to her person, property or character or for an injury arising out of the marital relation, as if unmarried." The precursor statute, N.Y. Dom. Rel. Law § 57, is discussed in Vernier, American Family Law § 180 (Supp. 1938).

[14] 3 Vernier, *supra* note 10, § 180, at 269.

[15] James, "Tort Law In Midstream: Its Challenge to the Judicial Process," 8 Buffalo L. Rev. 315, 335 (1959).

> the action as by denying it; and since the insurer is the party really interested in the defense, any conception of family unity can scarcely protect him. On the other hand, of course, the danger of collusion between the injured person and the insured, always present in liability insurance cases, is considerably increased by the family relation.[16]

Most courts, however, have been reluctant to use the existence of liability insurance as an occasion to permit one spouse to sue the other in a tort action, while other courts recognize that the law is unsettled.[17]

A final factor which may contribute to the new direction in the law is the gradual abandonment of fault in determining liability. Under the doctrine of *Brown v. Kendall* [18] negligence was the criteria for establishing liability. However, beginning with *Fletcher v. Rylands,* [19] cases in various tort areas have emerged based on a strict liability doctrine.[20] One noted writer has recently advocated that other areas should be included.[21] Recent proposals in regard to automobile injuries have encouraged the movement by advocating indemnity without regard to negligence.[22] In the area of guest statutes there has also been a trend toward liberality in indemnifying the injured.[23]

If insurance becomes compulsory and the fault principle is abandoned, the view which permits interspousal suits should become more prevalent.

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[16] Prosser, Torts 677 (2d ed. 1955). See Harvey v. Harvey, 239 Mich. 142, 214 N.W. 305 (1927); Newton v. Weber, 119 Misc. 240, 196 N.Y.S. 113 (Sup. Ct. 1922).

[17] Boisvert v. Boisvert, *supra* note 5. *Cf.* Blakemore, Massachusetts Motor Vehicle Law § 295 (1946) which says: "The court has not yet settled the question whether the existence of liability insurance enables the wife to sue the husband for negligent operation, but a very strong argument might well be made for liability of the insurance company if its policy covers the case."

[18] Brown v. Kendall, 60 Mass. (6 Cush.) 292 (1850).

[19] Fletcher v. Rylands, [1868] L.R. 3 H.L. 330, 338. *Cf.* Brown v. Collins, 53 N.H. 442 (1873), which rejected the *Fletcher* doctrine.

[20] See generally, Restatement, Torts §§ 519, 520 (1938); Witman Hotel Corp. v. Elliott, 137 Conn. 562, 79 A.2d 591 (1951) (blasting); Prentiss v. National Airlines, 112 F.Supp. 306 (D. N.J. 1953) (airline crash); Luthringer v. Moore, 31 Cal. 2d 489, 190 P.2d 1 (1948) (pest eradication).

[21] James, *supra* note 15, at 337. *Cf.* Keeton, "Conditional Fault in the Law of Torts," 72 Harv. L. Rev. 401, 419 (1959), who explains the existing areas of strict liability on the basis of shifting the risk to one who is morally blameworthy.

[22] See Green, Traffic Victims: Tort Law and Insurance (1958); Ballantine, "A Compensation Plan for Railway Accident Claims," 29 Harv. L. Rev. 705 (1916); Dowling, "Compensation for Automobile Accidents: A Symposium," 32 Colum. L. Rev. 785 (1932). See also Blum & Kalven, "Public Law Perspectives on a Private Law Problem—Auto Compensation Plans," 31 U. Chi. L. Rev. 641 (1964), for a general discussion of the area.

[23] Annot., 10 A.L.R.2d 1351 (1950). See Collins v. Rydman, 344 Mich. 588, 74 N.W. 2d 900 (1956), in which the occupant accompanied the driver to help pick up costumes and such circumstances were sufficient to go to the jury; Kizer v. Bowman, 256 N.C. 565, 124 S.E.2d 543 (1962), in which an occupant paid one-half of the gas and oil and was ruled not a guest; Gilliland v. Singleton, 204 Va. 115, 129 S.E.2d 641 (1963), in which a member of a car pool was ruled not a guest.

The achievement of justice would far outweigh the alleged disadvantages of such a practice. It was against this background of liberality toward recovery that the New Hampshire court in the instant case was called upon to apply either its own liberal law or the comparatively harsh Massachusetts doctrine.

This conflict between the laws of the two states set the stage for the second and more interesting determination. The second trend followed in the instant case is that away from the *lex loci delictus* toward the *lex loci domicilii* in tort actions when family relationship exists between the parties. The court in the principal case could have followed its decision in *Gray v. Gray* which held the *lex loci delictus* to control.[24] However, the court preferred to overrule *Gray* and to join several other jurisdictions by declaring the *lex loci domicilii* to control.

In England, torts did not become an independent subject of conflicts law until the middle of the nineteenth century.[25] The assumption that foreign law governs the tort action first appeared in 1883.[26] An elaborate footnote in Story's chapter on crime became the basis for the fateful proposition that "the true doctrine . . . proceeds upon the broad ground of the right of action given by the law of the foreign state. . . ." [27] Nineteen years later, Mr. Justice Holmes adopted the view in the leading American case, stating that the lawfulness of an act "must be determined wholly by the law of the country where the act is done." [28] The original Restatement[29] followed this view and has until recently been used as the basis for the application of the *lex loci delictus.* However, a recent tentative draft, drawing on recent cases, suggests that since the domicile jurisdiction has the most significant relationship to the parties in an interspousal tort action, its law should apply.[30]

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[24] Gray v. Gray, *supra* note 6.

[25] Smith, "Torts and the Conflicts of Laws," 20 Mod. L. Rev. 447, 450-52 (1957).

[26] Story, Conflict of Laws (8th ed. 1883).

[27] *Id.* at 845 n. (*a*), relying on dictum in Dennick v. Railroad Co., 103 U.S. 11, 18 (1880).

[28] American Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909).

[29] Restatement, Conflict of Laws §§ 384, 377 (1934):

§ 384. (1) If a cause of action in tort is created at the place of wrong, a cause of action will be recognized in other states.

(2) If no cause of action is created at the place of wrong, no recovery in tort can be had in any other state.

§ 377. The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place.

[30] Restatement (Second), Conflict of Laws §§ 379, 390g (Tent. Draft No. 8, 1963):

§ 379. (1) The local law of the state which has the most significant relationship with the occurrence and with the parties determines their rights and liabilities in tort.

§ 390g. Whether one member of a family is immune from tort liability to another member of the family is determined by the local law of the state of their domicile.

The reporter relies upon Pirc v. Kortebein, 186 F. Supp. 621 (E.D. Wis. 1960); Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955); Pittman v. Deiter, 10 Pa. D. &

Brainerd Currie has observed that since the decision in *Grant v. McAuliffe*,[31] the California Supreme Court has made "serious efforts to break away from sterile formalism and to develop a rational approach to conflict-of-laws problems." [32] This same court later handed down a landmark decision in *Emery v. Emery* [33] in which the court used this rational approach toward conflict-of-laws questions involving family immunities, and intimated the forthcoming change suggested by the tentative draft. In *Emery* two daughters and the mother sued the father and the son, the owner and driver respectively, for the negligent operation of an automobile which resulted in injuries to the daughters. The accident occurred in Idaho. Though the court dismissed the mother's complaint for failure to join the father, the daughters recovered under the applicable California law.[34] The law of Idaho, the place of the accident, was ignored. The court reasoned its decision as follows:

> It is not, however, a question of tort, but one of capacity to sue and be sued and as to that question the place of the injury is both fortuitous and irrelevant. . . . [I]mmunities from suit because of a family relationship are more properly determined by reference to the law of the state of the family domicile. That state has the primary responsibility for establishing and regulating the incidents of the family relationship and it is the only state in which the parties can, by participation in the legislative processes, effect a change in those incidents.[35]

Emery can be distinguished on its facts from the instant case; however, the above dictum regarding family immunity set the stage for further decisions. The next important ruling was *Haumschild v. Continental Cas. Co.* [36] where, as in the principal case, the wife sued her husband in tort. The state of the domicile, Wisconsin, allowed such suits, but the state where the accident occurred, California, did not. The Wisconsin Supreme Court held that the law of the domicile controlled. Both of these decisions relied extensively on a law journal article which concluded that we must separate status and tort and permit each to be determined by its appropriate conflict rule. [37]

C.2d. 360 (1957); Haynie v. Hanson, 16 Wis. 2d 299, 114 N.W.2d 443 (1962); Haumschild v. Continental Cas. Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959); and Bodenhagen v. Farmers Mut. Ins. Co., 5 Wis. 2d 306, 95 N.W.2d 822 (1959), for his statement of the general principle.

[31] Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953).

[32] Currie, "Survival of Actions: Adjudication versus Automation In the Conflict of Laws," 10 Stan. L. Rev. 205, 208 (1958), discussing Grant v. McAuliffe, *supra* note 31, in which the law of the domicile (providing for survival) and not the law of the place of injury (providing for abatement) was applied.

[33] Emery v. Emery, *supra* note 30.

[34] Cal. Civ. Code § 3523 states: "For every wrong there is a remedy."

[35] Emery v. Emery, *supra* note 30, at 427-28, 289 P.2d at 222-23.

[36] Haumschild v. Continental Cas. Co., *supra* note 30.

[37] Ford, "Interspousal Liability for Automobile Accidents in the Conflict of Laws," 15 U. Pitt. L. Rev. 397 (1954).

The court in the principal case through citation suggested two reasons for its decision that the *lex loci delictus* should no longer be applied to determine the interspousal rights of parties domiciled in the forum state. The court reiterated the basic conflicts argument that foreign law is never compulsory if it contravenes the public policy of the forum. The court had previously ruled that foreign substantive law would not be allowed in such cases.[38] Further, the court refused to acknowledge a distinction between the law controlling status and that controlling the incidents of status. This proposition was expressly reflected in the sentence, "We consider that the incidents of the status of marriage of parties domiciled here should not be determined by the law of another jurisdiction merely because they chance to be involved in an accident there." [39] The court supported this reason by noting the trend in other jurisdictions [40] and in the Restatement. [41]

The decision in the principal case, like most conflict cases, may raise a problem of forum shopping. If a New Hampshire couple have an accident in Massachusetts, an interspousal suit might be instituted in either the Massachusetts or New Hampshire court. If an action were brought in Massachusetts, the court would apply the *lex loci delictus* and the suit would be dismissed.[42] However, if the suit were instituted in New Hampshire the *lex loci domicilii* would control and the action would be allowed as the principal case holds. On the other hand, if the couple were domiciled in Massachusetts and had an accident in New Hampshire, the opposite would result in the respective courts. In the New Hampshire litigation, the law of the domicile, Massachusetts, would control.[43] Therefore, the New Hampshire courts by applying Massachusetts substantive law would

[38] Robinson v. Dixon, *supra* note 7. See also Saloshin v. Houle, 85 N.H. 126, 155 Atl. 47 (1931).

[39] Thompson v. Thompson, *supra* note 8, at 89, 193 A.2d at 441. The principal case was not the first case in the jurisdiction to recognize the growing trend, for dictum in Morin v. Letourneau, *supra* note 7, at 311, 156 A.2d at 132 stated, "Recent developments in the field of conflict of laws indicate support in interspousal or family suits, arising out of wrongs committed in foreign jurisdictions, for the view that the rights of the parties should be determined in accordance with the law of the domicile of the parties."

[40] See cases cited *supra* note 30.

[41] See Restatement, *supra* note 29; Restatement (Second), *supra* note 30.

[42] See Mass. Gen. Laws Ann., *supra* note 3. The statute has been applied to non-residents. See Blumenthal v. Blumenthal, 303 Mass. 275, 21 N.E.2d 244 (1939), in which the wife's suit setting aside the husband's allegedly fraudulent conveyance was dismissed. Both were New York residents. In Charney v. Charney, 316 Mass. 580, 55 N.E.2d 917 (1944), the wife, a resident of New York, was prevented under the statute from maintaining a suit to recover arrears in payments of a separation agreement against the resident husband.

[43] This introduces the problem of renvoi, a doctrine under which the court in resorting to foreign law adopts also the foreign rules on conflicts of laws. Therefore, if New Hampshire were to adopt Massachusetts law and its rules on conflict of laws, which state New Hampshire laws control, New Hampshire would have to adopt its

dismiss the suit. If the suit, though, were brought in Massachusetts, the court would apply the *lex loci delictus* and allow the suit.

To avoid forum shopping and confusion in policy, the jurisdictions will have to find a consistent meeting ground. The best answer appears to be that interspousal conflict questions should be resolved by applying the law of the jurisdiction which has the most significant relationship to the parties—the law of the domicile.

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own laws which adopt the Massachusetts law. This would lead one around in circles forever. The doctrine, however, has been almost universally rejected and the courts will apply only the substantive law of the foreign jurisdiction and not its laws on conflicts. See 16 Am. Jur. 2d *Conflict of Laws* § 2 (1964); 15 C.J.S. *Conflict of Laws* § 7 (1939); and Griswold, "Renvoi Revisited," 51 Harv. L. Rev. 1165, 1170, 1173 (1938), in which the author concedes that the overwhelming weight of authority is against the renvoi doctrine, although he favors it.